Penang Development Corp v Trikkon Construction Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-267 OF 1995
SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
24 JUNE 1997

Arbitration *— Arbitrator — Revocation of appointment — No power for revocation given in arbitration agreement — Whether the High Court had jurisdiction to revoke the appointment of an arbitrator and to name another in his place — Arbitration Act 1952 ss 3 & 26(2)*

Under cl 34 of a written agreement between the appellant and the respondent, it was agreed that in case of dispute between the parties, the dispute must be referred to an arbitrator. A dispute arose between the parties and as a result one Dato' Kington Loo ('the arbitrator') was appointed as the arbitrator who commenced the hearing of the dispute. Before proceedings came to an end, the appellant objected to the manner the proceedings were conducted by the arbitrator. By a letter dated 31 March 1992, the arbitrator purported to withdraw as an arbitrator. This letter had been accepted by both parties as a tender of his resignation to continue acting as the arbitrator. The parties then agreed to the appointment of one Dato' George Seah as their new arbitrator ('the new arbitrator'). However, before the new arbitrator could hold his preliminary meeting with the parties, the appellant questioned the necessity of establishing the agreement authorizing the new appointment and the requirement that new terms of reference had to be approved by both of them before the appointment of the new arbitrator could be formalized. The appellant contended that cl 34 was no longer applicable to either of them and in the absence of any agreement as to the appointment of another arbitrator to replace the retired one and in the absence of the terms of reference, the respondent must resolve the disputes in a court of law.

The respondent applied to the court for the following reliefs: (i) that leave be granted to revoke the appointment and authority of the arbitrator; and (ii) that the new arbitrator be appointed to act as the sole arbitrator in place of the arbitrator. The judge held that the court had the power to revoke the appointment and authority of the arbitrator pursuant to s 3 of the Arbitration Act 1952 ('the Act') and to make fresh appointment under s 26(2) of the Act. As to the terms of reference of the new arbitrator, the learned judge held that that should be left to the new arbitrator who had ample powers to settle the terms of reference in the event the parties were unable to agree on the terms. The appellant appealed. The issue before the court was whether the High Court had the jurisdiction to revoke the appointment of an arbitrator and to name another in his place.

Held, dismissing the appeal:

(1) (Per **Siti Norma Yaakob JCA**) Since the agreement between the parties made no provision as to the circumstances when the arbitrator's appointment could be revoked, the parties had to fall back on s 3 of the Act, which makes provision to that effect.

On the facts of this case, the High Court could not but come to the only conclusion that by his letter dated 31 March 1992, the arbitrator had evinced an intention to resign from his appointment following the appellant's objection and he could no longer be impartial. Under these circumstances, it was only right and proper for the court to intervene and grant leave to revoke the arbitrator's appointment and authority as it was the only right thing to do (see p 123B–H).

(2) (Per **Siti Norma Yaakob JCA**) Under sub-s (2)(a) of s 26 of the Act, the High Court is seized with the necessary discretion to appoint a substituted arbitrator to replace a retired one and the effect of that substituted appointment under sub-s (3) of the same section is as if the substituted arbitrator had been appointed under cl 34 of the agreement. For that reason, the appellant's submission that there need to be a fresh mandate under which the substituted appointment could be made, had no merit in law. Likewise, the pre-requisite that fresh terms of reference had to be agreed by the parties and submitted to the new arbitrator, as these were practical matters that form part of the arbitration proceedings which were best left to the new arbitrator who had already indicated his willingness to arbitrate.

Thus, there did not appear to be any reason to suggest that the judge had in way exercised his discretion wrongly by appointing the new arbitrator to replace the arbitrator after the appointment of the latter had been revoked. Likewise, they did not render the granting of the leave to be contrary to law as the judge was seized of the jurisdiction to make such an order under s 3 of the Act (see pp 124H–125E).

(3) (Per **Mokhtar Sidin JCA**) From the wordings of s 3, it is clear that in an arbitration agreement, there is no power to revoke the appointment of an arbitrator unless the arbitration agreement itself gives the power for such revocation. In the present appeal, it had not been shown that the arbitration agreement had given the power for revocation. In such a situation, the revocation could only be made under s 3 of the Act, ie by leave of the court (see p 127H–I); *Union of India v Bahadur Singh* AIR 1963 Assam 195, *VG Ghawda Pvt Ltd v Union of India* AIR 1978 Cal 271 and *Shamji Mal v Sefton & Co* AIR 1954 Punjab 190 followed.

(4) (Per **Mokhtar Sidin JCA**) There was no merit in the contention of the appellant that there was removal of the arbitrator and not a revocation and as such s 24 of the Act applied. From the facts, it was clear that there was no question of removal. There was no

application for the removal of the arbitrator under s 24 of the Act or any allegation of misconduct on the part of the arbitrator which warrant his removal. The only application before the court was for leave to revoke the appointment of the arbitrator and for the appointment of the new arbitrator. The procedure taken by the plaintiff to revoke the appointment of the arbitrator under s 3 of the Act and at the same time applying to appoint the new arbitrator under s 26(2) of the Act was the correct procedure (see p 131CI).

[Bahasa Malaysia summary

Di bawah fasal 34 suatu perjanjian bertulis di antara perayu dan penentang, telah dipersetujukan bahawa dalam kes pertikaian di antara pihak-pihak, pertikaian tersebut harus dirujuk kepada seorang penimbangtara. Suatu pertikaian telah timbul di antara pihak-pihak dan akibatnya seorang bernama Dato' Kington Loo ('penimbangtara tersebut') telah dilantik sebagai penimbangtara yang telah memulakan perbicaraan pertikaian tersebut. Sebelum prosiding ditamatkan, perayu telah membantah kepada cara prosiding tersebut dikendalikan oleh penimbangtara. Melalui surat bertarikh 31 Mac 1992, penimbangtara telah menarikbalik sebagai penimbangtara. Surat tersebut telah diterima oleh kedua-dua pihak sebagai perletakan jawatan sebagai penimbangtara. Pihak-pihak kemudiannya telah besetuju kepada perlantikan Dato' George Seah sebagai penimbangtara yang baru ('penimbangtara baru tersebut'). Walau bagaimanapun, sebelum penimbangtara baru itu dapat mengadakan perjumpaan pendahuluan dengan pihak-pihak, perayu telah mempersoalkan keperluan mengesahkan perjanjian yang memberikuasa kepada perlantikan yang baru dan keperluan bahawa bidang tugas yang baru harus diluluskan oleh kedua-dua pihak sebelum perlantikan penimbangtara baru itu dapat disahkan. Perayu telah berhujah bahawa fasal 34 tidak lagi terpakai kepada kedua-dua mereka dan tanpa perjanjian berkenaan dengan perlantikan penimbangtara baru untuk menggantikan penimbangtara yang telah meletak jawatan dan tanpa bidang tugas, penentang mestilah menyelesaikan pertikaian di mahkamah undang-undang.

Penentang telah memohon kepada mahkamah untuk relif-relif berikut: (i) supaya kebenaran diberikan untuk membatalkan perlantikan dan kuasa penimbangtara; dan (ii) bahawa penimbangtara yang baru dilantik untuk bertindak sebagai penimbangtara tunggal dengan menggantikan penimbangtara tersebut. Hakim telah memutuskan bahawa mahkamah mempunyai kuasa untuk membatalkan perlantikan dan kuasa penimbangtara menurut s 3 Akta Timbangtara 1952 ('Akta tersebut') dan untuk membuat suatu perlantikan baru di bawah s 26(2) Akta tersebut. Berkenaan dengan bidang tugas penimbangtara baru, hakim yang arif telah memutuskan bahawa perkara itu harus ditinggalkan dengan penimbangtara baru yang mempunyai kuasa yang cukup untuk menyelesaikan bidang

tugas dalam keadaan di mana pihak-pihak tidak bersetuju mengenai bidang tugas. Perayu telah merayu. Isu di hadapan mahkamah adalah sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk membatalkan perlantikan penimbangtara dan menggantikannya dengan seorang lagi.

Diputuskan, menolak rayuan:

(1) (Oleh **Siti Norma Yaakob HMR**) Oleh kerana perjanjian di antara pihak-pihak tidak mempunyai peruntukan mengenai keadaan ketika perlantikan penimbangtara boleh dibatalkan, maka pihak-pihak terpaksa bergantung kepada s 3 Akta tersebut, yang mempunyai peruntukan untuk keadaan tersebut.

Berdasarkan fakta-fakta kes ini, Mahkamah Tinggi hanya hanya dapat sampai kepada suatu kesimpulan sahaja, iaitu berdasarkan surat bertarikh 31 Mac 1992, penimbangtara telah menunjukkan niat untuk meletak jawatan berikutan dengan bantahan perayu bahawa dia tidak lagi saksama. Berdasarkan keadaan, adalah wajar dan sesuai untuk mahkamah campurtangan dan memberikan kebenaran untuk membatalkan perlantikan dan kuasa penimbangtara kerana ianya adalah suatu tindakan yang wajar dilakukan (lihat ms 123B–H).

(2) (Oleh **Siti Norma Yaakob HMR**) Di bawah sub-s (2)(a) s 26 Akta tersebut, Mahkamah Tinggi mempunyai budi bicara yang perlu untuk melantik penimbangtara gantian untuk menggantikan penimbangtara yang bersara itu dan kesan perlantikan gantian tersebut di bawah sub-s (3) seksyen yang sama adalah seperti penimbangtara gantian itu telah dilantik di bawah fasal 34 perjanjian tersebut. Untuk tujuan itu, penghujahan perayu bahawa seharusnya ada mandat baru di bawah mana perlantikan baru dapat dibuat, tidak ada merit dari segi undang-undang. Seperti itu juga, pra-syarat bahawa bidang tugas harus dipersetujui oleh kedua-dua pihak dan dikemukakan kepada penimbangtara baru, oleh kerana ini merupakan perkara-perkara praktik yang merupakan sebahagian daripada prosiding timbangtara yang lebih baik ditinggalkan dengan penimbangtara baru yang telahpun menyatakan keinginannya untuk menimbangtara.

Maka, tidak kelihatan sebarang sebab untuk mencadangkan bahawa mahkamah telah melaksanakan budi bicaranya dengan salah dengan melantik penimbangtara baru untuk menggantikan penimbangtara setelah perlantikannya telah dibatalkan. Seperti itu juga, mereka telah tidak memutuskan bahawa pemberian kebenaran adalah salah di sisi undang-undang kerana hakim telah diberi budi bicara untuk membuat perintah tersebut di bawah s 3 Akta tersebut (lihat ms 124H–125E).

(3) (Oleh **Mokhtar Sidin HMR**) Berdasarkan perkataan s 3, adalah jelas bahawa dalam suatu perjanjian timbangtara, tidak ada kuasa untuk membatalkan kuasa penimbangtara kecuali jika perjanjian timbangtara itu memberikan kuasa untuk pembatalan tersebut.

A Dalam rayuan ini, tidak ditunjukkan bahawa perjanjian timbangtara itu telah memberikan kuasa untuk pembatalan. Dalam keadaan begitu, pembatalan hanya boleh dilakukan di bawah s 3 Akta tersebut, iaitu dengan kebenaran mahkamah (lihat ms 127H–I); *Union of India v Bahadur Singh* AIR 1963 Assam 195, *VG Ghawda Pvt Ltd v Union of India* AIR 1978 Cal 271 dan *Shamji Mal v Sefton & Co* AIR 1954 Punjab 190 diikut.

(4) (Oleh **Mokhtar Sidin HMR**) Tidak ada merit dalam penghujahan perayu bahawa terdapatnya penyingkiran penimbangtara dan bukannya pembatalan dan oleh itu s 24 Akta tersebut tidak terpakai. Berdasarkan fakta-fakta, adalah jelas bahawa tidak adanya soalan penyingkiran. Tidak terdapatnya pemohonan untuk penyingkiran penimbangtara di bawah s 24 Akta tersebut ataupun apa-apa pengataan salahlaku di pihak penimbangtara yang memerlukan penyingkirannya. Permohonan tunggal di hadapan mahkamah adalah untuk kebenaran membatalkan perlantikan penimbangtara dan untuk perlantikan penimbangtara baru. Prosedur yang digunakan oleh plaintif untuk membatalkan perlantikan penimbangtara di bahawa s 3 Akta tersebut dan pada masa yang sama memohon untuk melantik penimbangtara baru di bawah s 26(2) Akta tersebut adalah prosedur yang betul (lihat ms 131C–I).]

Notes

For cases on arbitrator, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 719–734.

Cases referred to

Shamji Mal v Sefton & Co AIR 1954 Punjab 190 (folld)
Sonelal v Lalta Prasad AIR 1955 MB 91 (refd)
Union of India v Bahadur Singh AIR 1963 Assam 195 (folld)
VG Ghawda Pvt Ltd v Union of India AIR 1978 Cal 271 (folld)

Legislation referred to

Arbitration Act 1952 ss 3, 12(a), 12(b), 24, 25(1), 25(2), 26(2)(a)
Courts of Judicature Act 1964 s 42

Appeal from: Originating Summons No 24–1131 of 1993 (High Court, Pulau Pinang)

Lim Kean Chye (*Foo Say Keow* with him) (*Murad & Foo*) for the appellant.

Mahinder Singh Dulku (*Mahinder Singh Dulku & Co*) for the respondent.

Cur Adv Vult

Siti Norma Yaakob JCA: Submissions in this appeal were first made before a full Bench at the end of which, judgment was reserved. Since then

a member of the panel, our brother, Dato' VC George, has retired. Under these circumstances, the views of the parties to this appeal are sought as to the future conduct of these proceedings to comply with s 42 of the Courts of Judicature Act 1964 the provisions of which, in so far as they are relevant, are as follows:

> 42 (1) If, ... in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceedings or otherwise exercise his functions as a Judge of that Court, the hearing of the proceedings shall, *if the parties consent*, continue before, and ... reserved judgment, ... shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceedings, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.
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> (2) In any such case as is mentioned in subsection (1) the proceedings shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.
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> (3) If the parties do not consent as aforesaid the appeal shall be re-heard. (Emphasis added.)

The above provisions are mandatory in nature and the parties, through their respective counsel, have given their consent that we, the remaining members of the panel shall continue to proceed to deliver our judgment, and we now do so.

The only issue raised in this appeal is whether the High Court had the jurisdiction to revoke the appointment of an arbitrator and to name another in his place. To answer this, we need to look into the circumstances of this particular case and to consider whether the High Court is seized with the necessary jurisdiction to make the order as it did.

Under a building contract dated 25 April 1985, the appellant appointed the respondent as their contractor to construct and complete the Podium Sub-Phase 1D of Kompleks Tun Abdul Razak, Pulau Pinang. One of the terms and conditions of the agreement provides arbitration as the forum for the resolution of any disputes or differences arising between the parties and the procedure for the appointment of an arbitrator and other incidence for such an appointment are all embodied in cl 34 of the agreement.

Disputes arose between the parties and they relate principally to the amount due on a Final Certificate No 25 dated 6 August 1988 issued by the respondent's architect and for which the appellant refused to pay. The parties resorted to cl 34 and they agreed to submit their disputes to the arbitration of Dato' Kington Loo ('the arbitrator'). That was in January 1988.

The arbitrator then proceeded to give directions for the delivery of pleadings and set a time table for the conduct of the proceedings. It is not too clear from the records when the arbitrator commenced hearing, but it is common ground that he conducted 19 sessions altogether, the last on

29 November 1991, at the end of which, Mr Lim Kean Chye, counsel for the appellant, objected to the manner proceedings were conducted by the arbitrator. The latter interpreted the objections to be that he was biased and that he was no longer capable of being impartial to the parties. The matter was then adjourned to enable the arbitrator to reconsider his position.

He did so on 31 March 1992, when he notified both parties that he had decided not to continue with the arbitration in the interests of all parties concerned. This letter has been accepted by both parties as a tender of his resignation to continue acting as the arbitrator. As at that stage of the proceedings, only one witness, that of the respondent, had testified.

What followed next were the attempts made by the parties, particularly the respondent, to have another arbitrator appointed to continue with the arbitration.

They started by enlisting the help of the President of the Malaysian Institute of Architects ('PAM') for a list of the arbitrators from the PAM panel to enable them to select a suitable and willing candidate as their new arbitrator. That was in June 1992. Their choice of a named person in the list came to nothing as he declined appointment. PAM was again requested to nominate the arbitrators in their panel who would be willing to be appointed and from whom a final selection would be made by the parties. This approach too proved unsuccessful as the prospect of continuing a part heard arbitration was too daunting to the prospective arbitrator. Finally, in February 1993, both parties agreed to the appointment of Dato' George Seah and he was not one of those listed with the PAM panel.

However, before the new arbitrator could hold his preliminary meeting with the parties, the appellant questioned the necessity of establishing the agreement authorizing the new appointment and the requirement that new terms of reference have to be approved by both of them before the appointment of the new arbitrator can be formalized. The appellant contended that cl 34 was no longer applicable to either of them and in the absence of any agreement as to the appointment of another arbitrator, to replace the retired one and in the absence of the terms of reference, the respondent must resolve the disputes in a court of law.

The respondent considered such a contention to be misconceived and on 24 December 1993 filed Originating Summons No 24–1131–93 against the appellant seeking the following principal reliefs:

(1) That leave be granted to revoke the appointment and authority of Dato' Kington Loo, the sole arbitrator appointed by the parties under cl 34 of the agreement.

(2) That Dato' George Seah be appointed to act as the sole arbitrator in place of Dato' Kington Loo.

(3) That Dato' George Seah be asked to proceed with reasonable dispatch to initiate the arbitration proceedings and if necessary to proceed ex

parte, should either party, having been given due notice, fail to attend. A

Abdul Hamid Mohamed J, who heard the originating summons in chambers allowed the respondent's application in terms of (1) and (2) above and costs. The learned judge held that s 3 of the Arbitration Act 1952 ('the Act'), gives him the power to revoke the appointment and authority of B Dato' Kington Loo and since there has been consensus to the appointment of Dato' George Seah to take over the arbitration, the appellant cannot now insist upon the disputes being decided by the courts. On that premise, the learned judge, acting under s 26(2)(a) of the Act, filled the vacancy with the appointment of Dato' George Seah as the sole arbitrator to C continue with the arbitration proceedings. These orders were confirmed by the learned judge when the matter was further argued in open court. It is to appeal against these orders that the parties came before us.

It is common ground that cl 34 of the agreement does not make provision for the substituted appointment of an arbitrator to replace one D who has resigned. For our purpose, only sub-cll (1) and (4) of cl 34 are relevant and for completeness those sub-clauses are reproduced as follows:

34 (1) In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor ... then such disputes or differences shall be referred to arbitration.

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Upon the disputes or differences having arisen, any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties or failing agreement or absence of reply or reluctance to act by the other party, then the party may, after the expiry of 14 days from the date of the notice to concur on the appointment F of an arbitrator, apply to the President or Vice President for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement be deemed to be appointed with the agreement and consent of the parties to the contract.

Upon appointment, the arbitrator shall with dispatch initiate G the arbitration proceedings following the provisions of the Arbitration Act 1952. The hearing may be ex parte should either party, having been given due notice, fail to attend.

...

(4) The award of such arbitrator shall be final and binding on the parties. H

The effect of such an arbitration clause in an agreement is spelt out by ss 3–12 of the Act, but for our purpose only s 3 is relevant and the provisions of which are as follows:

3 Authority of arbitrators and umpires to be irrevocable I

The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court.

A For the purpose of prayer (1) of the respondent's originating summons, what is in issue is whether the arbitrator's letter of resignation per se serves as sufficient notice in law to amount to a revocation of his appointment. This must depend on the agreement that appointed him in the first place. Since that agreement is silent as to the limit or extension of his appointment and makes no provision as to the circumstances when his appointment can be revoked, the parties have to fall back on s 3 of the Act, which makes provision to that effect. Under that section, the appointment can only be revoked by leave of the court and it was for this purpose that the respondent initiated the proceedings leading to this appeal to enable the appointment of Dato' Kington Loo to be revoked and replaced by Dato' George Seah.

C In this respect, the appellant contended that s 3 is only a general section and that the only way the arbitrator's appointment can be revoked is by the exercise of the power conferred under s 25(1) and (2) of the Act. This contention cannot be correct as the facts of this case bring it outside the scope of that section which is worded as follows:

D 25 Power of High Court to give relief where arbitrator is not impartial or the dispute involves question of fraud

(1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator *named or designated* in the agreement and, after a dispute has arisen, any party applies, on the ground that the arbitrator *so named or designated* is not or may not be impartial ... .

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(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been *guilty of fraud* ... . (Emphasis added.)

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Clause 34 of the agreement does not identify the arbitrator by name or by designation and as such s 25(1) is inapplicable to the facts of this appeal. Clause 34 merely refers to the appointment of an arbitrator to be agreed between the parties to resolve any dispute arising from the building contract which they had executed. Likewise, sub-s (2) of s 25 is also not applicable as it deals with the question of fraud on the part of the contracting parties which is not the case before us.

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On the facts of this case, the High Court cannot but come to the only conclusion that by his letter dated 31 March 1992, the arbitrator had evinced an intention to resign from his appointment following the appellant's objection and he can no longer be impartial. Under these circumstances, it is only right and proper for the court to intervene and grant leave to revoke the arbitrator's appointment and authority as it is the only right thing to do.

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As for the order that Dato' George Seah replace the retired arbitrator and to proceed to continue with the arbitration proceedings, the appellant's main objection is also on the lack of jurisdiction on the part of the High Court to make such an order as cl 34 of the agreement has already spent itself and no longer workable and with no machinery to appoint a second

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arbitrator, the respondent cannot resort to s 12(b) of the Act which contains the following provisions:

> 12 Power of High Court in certain cases to appoint an arbitrator or umpire
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> In any of the following cases:
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> ...
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> (b) if an appointed arbitrator refuses to act, or is incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy; ... ;
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> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

I concede that s 12(b) is not applicable as that section covers the situation where an initial appointee refuses to act as the arbitrator or for some reason is incapable of acting or dies. This presupposes that the arbitrator had yet to take any active part in the arbitration proceedings. In this appeal, the situation is quite different. Here, Dato' Kington Loo was appointed the sole arbitrator in early 1988. Since cl 34 did not incorporate any procedural rules governing the conduct of the arbitration, he set the time table how such proceedings were to be conducted. Pleadings were delivered and exchanged. Nineteen sessions were held that stretched from early 1988 to late 1992, during which period he heard the evidence of the respondent's one witness which stretched for a number of days. It was only at the 19th session when the appellant objected to his continued hearing that Dato' Kington Loo decided to withdraw, an act that was accepted by the parties as an intention to resign from arbitrating further and which was subsequently confirmed by the court below.

Revocation has the effect of putting an end to the authority of Dato' Kington Loo to continue with the arbitration proceedings and nothing more. It does not contemplate the revocation of cl 34 of the agreement or render it to be in any way unworkable or cancelled. Perhaps, the only practical defect caused by that clause lies in its failure to incorporate any procedural rule governing the appointment of a substituted arbitrator to replace a retired one. To cure this defect, we have to turn to the Act itself and under sub-s (2)(a) of s 26 of the Act, the High Court is seized with the necessary discretion to appoint a substituted arbitrator to replace a retired one and the effect of that substituted appointment under sub-s (3) of the same section is as if the substituted arbitrator had been appointed under cl 34 of the agreement. For that reason, the appellant's submission that there need to be a fresh mandate under which the substituted appointment can be made, has no merit in law. Likewise, the prerequisite that fresh terms of reference have to be agreed by the parties and submitted to the new arbitrator, as these are practical matters that form part of the arbitration

proceedings which are best left to Dato' George Seah who had already indicated his willingness to arbitrate.

For ease of reference, sub-ss (2)(a) and (3) of s 26, insofar as they are relevant, are reproduced as follows:

> 26 Power of High Court where arbitrator is removed or authority of arbitrator is revoked
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> ...
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> (2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the High Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the High Court, the High Court may, on the application of any party to the arbitration agreement, either —
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> (a) appoint a person to act as sole arbitrator in place of the person or persons removed; or
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> ...
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> (3) A person appointed under this section by the High Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

Reading the judgment of the High Court, there does not appear to be any reason to suggest that the learned judge had in way exercised his discretion wrongly by appointing Dato' George Seah to replace Dato' Kington Loo after the appointment of the latter had been revoked. The circumstances of this case speak for themselves and likewise, they do not render the granting of the leave to be contrary to law as the learned judge was seized of the jurisdiction to make such an order under s 3 of the Act. For those reasons, his decision is affirmed, this appeal is dismissed with costs and the deposit will be paid out to the respondent to account of its taxed costs.

Mokhtar Sidin JCA: This is an appeal by Penang Development Corp against the decision of the learned High Court judge given on 31 March 1995 confirming his own given in chambers on 24 February 1994 whereby it was ordered that leave be granted to revoke the appointment of Dato' Kington Loo, the sole arbitrator appointed by the appellant ('the defendant') and the respondent ('the plaintiff') pursuant to cl 34 of the agreement and it was also ordered that Dato' George Seah be appointed to replace Dato' Kington Loo as the sole arbitrator.

In this case, the plaintiff applied to the High Court, Penang by way of originating summons, inter alia, for the following orders:

(1) that leave be granted to revoke the appointment and authority of Dato' Kington Loo of BEP Akitek Sdn Bhd, 47 Jalan Dungun, Bukit Damansara, Kuala Lumpur, the sole arbitrator duly appointed by the plaintiff and the defendant pursuant to cl 34 of the agreement between the plaintiff and the defendant dated 24 April 1985; and

(2) that Dato' George Seah of Apartment DD–1–1, Block D1 RSGC View, Desa Pandan, Kuala Lumpur be declared as the duly appointed arbitrator in place of Dato' Kington Loo in that above matter.

Under cl 34 of the written agreement between the parties, it was agreed that in case of dispute between the parties, the dispute must be referred to an arbitrator. A dispute arose between the parties and as a result Dato' Kington Loo was appointed as the arbitrator. Dato' Kington Loo, after his appointment as arbitrator, commenced the hearing of the dispute. The principal witness for the plaintiff had given evidence and had been cross-examined and it is common ground that the examination of that witness took several days. However, before proceedings came to an end, the defendant's counsel requested the arbitrator to withdraw as an arbitrator. The plaintiff's counsel objected to the defendant's request. By a letter dated 31 March 1992, the arbitrator purported to withdraw as an arbitrator. Thereafter, the parties attempted to have another arbitrator appointed by the Pertubuhan Akitek Malaysia to replace Dato' Kington Loo but they were unsuccessful. Eventually, both the plaintiff and the defendant agreed to appoint Dato' George Seah as the new arbitrator. However, it would appear that another dispute arose between the parties as to the terms of reference in respect of the appointment of Dato' George Seah.

Dato' George Seah had agreed to the appointment and was willing to have a preliminary meeting with the parties/counsel. However, the defendant refused to attend the preliminary hearing before resolution is reached as to the said terms of reference in respect of Dato' George Seah's appointment.

Because of the defendant's refusal, the plaintiff took out the originating summons. The learned trial judge both in chambers and in open court (after the request to do so by the defendant) held that the court has the power to revoke the authority of Dato' Kington Loo, the duly appointed arbitrator, pursuant to s 3 of the Arbitration Act 1952 ('the Act') and to make a fresh appointment under s 26(2) of the Act. As to the said terms of reference of the new arbitrator, the learned judge held that that should be left to the arbitrator who had ample powers to settle the terms of reference in the event the parties were unable to agree on the said terms.

The first point raised by counsel for the defendant was that after the abandonment of the proceedings by the purported withdrawal of Dato' Kington Loo, in the context of cl 34 of the agreement between the parties, the court had no jurisdiction to appoint another arbitrator. It was submitted by counsel that s 12 of the Act does not permit this. Clause 34 of the Agreement reads as follows:

> 34 Upon the disputes or differences having arisen, any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties or failing agreement or absence of reply or reluctance to act by the other party then the party may, after the expiry of fourteen days from the date of the notice to concur on the appointment of an arbitrator, apply to the President or Vice President for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement be deemed to be appointed with the agreement and consent of the parties to the contract.

Section 12 of the Act provides as follows:

A 12 Power of High Court in certain cases to appoint an arbitrator or umpire

In any of the following cases:

(a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

It was submitted by counsel for the defendant that the court had no power to appoint an arbitrator when the parties could not get one appointed pursuant to cl 34 of the agreement between the parties. To this counsel for the plaintiff conceded that if the application is made under s 12 of the Act, the court may have no power to do so. It was, however, contended by counsel for the plaintiff that the application to the court is not made under s 12, but under s 3 and furthermore the parties had already agreed to the appointment of a new arbitrator in place of the arbitrator who had himself withdrawn or purported to withdraw from being the arbitrator.

Section 3 of the Act provides as follows:

3 Authority of arbitrators and umpires to be irrevocable

The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court.

It is contended by the plaintiff that s 3 gives the power to the court to grant leave to revoke the appointment of an arbitrator.

From the wordings of s 3, it is clear that in an arbitration agreement, there is no power to revoke the appointment of an arbitrator unless the arbitration agreement itself gives the power for such revocation. In the present appeal, it has not been shown to us that the arbitration agreement has given the power for revocation. In my opinion, in such a situation, the revocation could only be made under s 3 of the Act, that is by leave of the

court. In this I have the support of the case of *Union of India v Bahadur Singh* AIR 1963 Assam 195 where Mehrotra CJ at pp 196–197 said: A

> (5) Regarding the contention of the appellant that the court has no jurisdiction to appoint another arbitrator after the first arbitrator had sent back the record as he was transferred, the short answer is that in none of the objections filed by the appellant, he had taken any such ground. Reliance is placed by the respondent on s 12(2) of the Indian Arbitration Act. Section 12(2) reads as follows: B
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> > 'Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either: (a) appoint a person to act as sole arbitrator in the place of the person or persons displaced; or (b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.' C
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> If the point had been taken in the courts below, then the court would have gone into the facts and come to a categorical conclusion as to whether the arbitration has been revoked or not. Section 5 of the Arbitration Act lays down that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement. The section clearly shows that the party has got a right to revoke the authority of an arbitrator. The only limitation is that the revocation is to be done with the permission of the court. Section 5 does not contemplate the revocation of the agreement. It only contemplates the revocation of authority of the arbitrator. The revocation can be implied from the circumstances of each case. Admittedly, when the arbitrator was transferred, he had expressed his desire to be relieved of his duty as he had been transferred and the court after hearing the parties appointed another arbitrator. It can be certainly held in the circumstances of the case that the authority of the arbitrator was revoked with the permission of the court. D E F
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> ... There is no particular method provided under s 5 for making any application for the revocation. If after hearing the parties, the court appoints another arbitrator and cancels the appointment of the previous arbitrator, in these circumstances the order of the court constitutes permission and the conduct of the parties itself amounts to revocation of the authority of the arbitrator. The arbitrator thus was appointed with the leave of the court. G

As can be seen, s 5 of the Indian Arbitration Act is in pari materia with s 3 of the Act. As such, once an arbitrator has been appointed, his appointment is irrevocable except with the leave of the court. It does not matter whether the arbitrator himself purported to withdraw after his appointment or whether his appointment was purported to be revoked by one or the other or both the parties. Until this leave of the court is obtained, the arbitrator continues to be an arbitrator. H I

In the case of *VG Ghawda Pvt Ltd v Union of India* AIR 1978 Cal 271 at p 274, SK Roy Choudhury J made the following observation:

A It is fundamental that the court has the power to appoint arbitrator where an appointed arbitrator has refused to act and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy. Here the arbitration agreement does not contain any procedure for the appointer to substitute an arbitrator in place of an arbitrator who has resigned or refused to act. Therefore, it is B only the court [which] is empowered to appoint the arbitrator in the present case.

In the case of *Shamji Mal v Sefton & Co* AIR 1954 Punjab 190, Bhandari CJ at p 192 observed:

C It may perhaps be mentioned in passing that as one arbitrator had already been appointed in this case, another arbitrator could be appointed only after the first arbitrator had been superseded. No order of supersession appears to have been passed in the present case. That order could have been passed only by a court and not by any one of the two parties to the agreement.

Applying the principles stated above to s 3 of the Act, it is clear to me that D when the agreement is silent as to the revocation of the appointment of an arbitrator, then only the court has the power to revoke that appointment. In the present appeal, it is common ground that the arbitration agreement has no provision relating to the revocation of the appointment of an arbitrator or for the withdrawal or resignation of an arbitrator. It is clear that Dato' Kington Loo wanted to withdraw and not willing to continue to E be the arbitrator. He could not do so as he had done here by way of a letter. His appointment could only be revoked by way of s 3 of the Act, viz by leave of the court.

Once the court has given leave to revoke an appointment of an arbitrator, who has the power to appoint a new arbitrator? It was submitted F by the defendant that once there is a revocation of the appointment of an arbitrator, neither the court nor anyone else has the power to appoint another arbitrator in his place. As such, it was submitted by the defendant's counsel that the arbitration clause in the agreement ceased to have effect and the only remedy left for the plaintiff is to sue the defendant in court. Counsel for the defendant contended that s 12 of the Act supports his G contention. It is obvious to me that counsel for the defendant was referring to s 12(a) of the Act.

Counsel for the defendant submitted that after the failure of the proceedings pursuant to an appointment under cl 34 of the agreement, the court had no jurisdiction to appoint another arbitrator because s 12 of the H Act did not permit it to be done. It was also submitted that the word 'refuse' in s 12 of the Act could not be read as 'resign' as contended by the plaintiff. The defendant cited several authorities in support and contended that as such the court has no inherent jurisdiction to appoint. As such, the learned trial judge had erred when he made the order which is the subject I of the present appeal. Counsel for the defendant went on to say that s 3 of the Act is a general provision and as such, there is a distinction between 'remove' which is in s 24 of the Act and 'revoke' in s 25 of the Act. The consequences of removal and revocation are set out in s 26(1) of the Act. Counsel went on to submit that in the present case, the arbitrator is

neither removed nor his appointment had been revoked and as such, the appointment of the new arbitrator under s 26 of the Act could not be effected. A

I have gone through the provisions of s 12(a) of the Act and, with respect, I do not agree with the contention of the counsel for the defendant. I agree with what had been contended by the plaintiff that s 12(a) of the Act has reference to the initial appointment, but has no application to successive appointments. Section 12(b) of the Act provides for situations where the arbitrator refuses to act or is incapable of acting or dies before he acts as an arbitrator. As can be seen from the facts in the present appeal, the original arbitrator had already acted but due to objections from the defendant while the hearing was going on, he refused to continue with the arbitration and tendered his resignation. It is clear to me that he could not resign because there is no provision under the agreement for him to do so. The only recourse left to the parties or to the arbitrator was to have the appointment of the arbitrator revoked by obtaining leave from the court to do so pursuant to s 3 of the Act. That was the recourse taken by the plaintiff in the present appeal when he applied to revoke the appointment of Dato' Kington Loo as an arbitrator. What could happen once the appointment of an arbitrator is revoked? It is obvious to me that by virtue of s 26 of the Act, a new arbitrator could be appointed by the court in place of the original arbitrator whose appointment has been revoked by leave of the High Court. This is clearly provided for by s 26(2) of the Act which reads as follows: B C D E

> 26 Power of High Court where arbitrator is removed or authority of arbitrator is revoked
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> ...
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> (2) *Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the High Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the High Court, the High Court may, on the application of any party to the arbitration agreement, either —*
>
> (a) *appoint a person to act as sole arbitrator in place of the person or persons removed*; or
>
> (b) order that the arbitration agreement shall cease to have effect with respect to the dispute referred.
>
> (Emphasis added.)

F G

It is clear to me that this section provides that upon the revocation of the appointment of an arbitrator, the court has the power to do one of two things, namely, appoint a new arbitrator or order that the arbitration agreement shall cease to have effect. The plaintiff has chosen to apply under the first, that is for the appointment of a new arbitrator in place of the arbitrator whose appointment had been duly revoked with the leave of the court. I am of the opinion that the plaintiff had chosen the correct recourse. H I

Section 26(2) of the Act is in pari materia with s 12(2) of the Indian Arbitration Act. In the case of *Union of India v Bahadur Singh* AIR 1963 Assam 195 at p 197, Mehrotra CJ said:

A Mr Medhi has relied upon s 11 of the Arbitration Act. On the finding that the order of the court constitutes permission to revoke the authority, the question of removal does not arise. Section 12 contemplates two circumstances under which a fresh arbitrator can be appointed — one is revocation and the other is removal. Section 11 deals with the removal of the arbitrator. But s 11 in terms does not apply to the case of revocation. B There is thus no force in the contention that the appointment of the second arbitrator was illegal.

Counsel for the defendant contended that in the present appeal there was removal of the arbitrator and not a revocation and as such s 24 of the Act (similar to s 11 of the Indian Act) applies. I could not find any merit in this C contention. From the facts as stated in the evidence, it is clear to me that there is no question of removal. There is no application for the removal of the arbitrator under s 24 of the Act or any allegation of misconduct on the part of the arbitrator which warrant his removal. The only application before the court is for leave to revoke the appointment of Dato' Kington Loo as the arbitrator and for the appointment of Dato' George Seah as the D new arbitrator. In my view, it is clear that this is a situation similar to what had been stated by Dixit J in the case of *Sonelal v Lalta Prasad* AIR 1955 MB 91. At p 92 Dixit J said:

> ... I must, howsoever, say that s 5 has no reference to a revocation of an arbitration agreement, which is always irrevocable. Section 5 only makes a E provision for the revocation of the authority of an appointed arbitrator or umpire. It provides that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement. Thus, the authority of an appointed arbitrator is not revoked merely by the fact that he has failed to give his award within four months after entering on the reference. The F precise point with which we are concerned, is, however, not the revocation of the authority of the arbitrator, but the effect of the revocation of the authority on the arbitration agreement.
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> The material section on this point is not s 5 but s 12(2) which says that when the authority of an arbitrator or an umpire is revoked by leave of the court, then the court may either appoint a person to act as sole arbitrator in G the place of the persons displaced, or order that the arbitration agreement shall cease to have effect. It is thus clear that even when the authority of an appointed arbitrator is revoked with the leave of the court, the revocation has not the effect of cancelling an arbitration agreement.

Section 5 of the Indian Act is in pari materia with s 3 of the Act and s 12(2) H of the Indian Act is in pari materia with s 26(2) of the Act.

Having examined the law and the procedures to be adopted, it is clear in my mind that the procedure taken by the plaintiff to revoke the appointment of Dato' Kington Loo under s 3 of the Act and at the same time applying to have Dato' George Seah appointed as the new arbitrator I under s 26(2) of the Act is the correct procedure. It is clear to me that the defendant had already agreed to the appointment of Dato' George Seah but then tried to create certain difficulties to the appointment as they had done when they asked the original arbitrator to withdraw. I agree with the

learned judge that Dato' George Seah as the new arbitrator has ample powers to have such terms of reference settled.

I could not find any error on the part of the learned trial judge when he revoked the appointment of Dato' Kington Loo and appointed Dato' George Seah in his place on the application of the plaintiff. I see no reason to interfere with his decision and the order he has made.

I therefore dismissed the appeal with costs. Deposit to be paid to the plaintiff to account of costs to be taxed.

Appeal dismissed.

Reported by Jafisah Jaafar